cases where the court has ordered the removal of the former or has turned down an application for extension of time. The sub-section may be construed as to enable another caveat to be entered provided it is based on different grounds from the former and after the former caveat has ceased to exist. In other words, it is not a renewal, revival or continuance of the former; it speaks of an entirely separate caveat distinct from the other. In the light of the above, and construing the relevant provisions of the Code as a whole as regards the subject, the only natural and logical construction that can be given by way of analogy is that they do not envisage the issue of a caveat when one is still in existence and the more so, on the same grounds. To construe otherwise will contravene the real intention of Parliament and tend to oust the jurisdiction and power of the court under section 326 which arise in this case. If the law is allowed to be circumvented by recognising the second caveat the result will undoubtedly be an overlapping of caveats on the same land, on the same ground and by the same caveator.

I have no alternative but to order the caveat dated October 3, 1973, be removed in accordance with the first prayer. I order the second prayer be also granted in the circumstances and the costs of this application be taxed and paid by the respondent to the applicant.

Order accordingly.

Solicitors: *Skrine & Co.; Daljit & Vijaya.*

MENON v. ABDULLAH KUTTY

[F. C. (Azmi L.P., Ali and Raja Azlan Shah F.JJ.) February 3, 1974]

[Kota Bharu — Federal Court Civil Appeal No. 102/1973]

Practice and Procedure — Appeal — Application for further security for costs of appeal — Discretion of court — Federal Court (Civil Appeals) (Transitional) Rules, 1963, r. 18(1).

The respondent had obtained judgment against the appellant for possession of certain premises on 26th August 1973. The appellant appealed against the said judgment but did not pay the costs of the High Court action. On 30 September, 1973 the appellant applied for stay of execution and this was granted. The respondent thereupon applied to the Federal Court (a) for security for the unpaid costs; (b) for further security for the costs of appeal.

Held: (1) the trial judge had a discretion whether to grant a stay conditionally on providing security for costs or unconditionally and in this case he had granted an unconditional stay. As it had not been shown that his exercise of discretion was plainly wrong, the Federal Court could not interfere;

(2) the discretion to order further security for costs of an appeal lay with the Federal Court. In the circumstances of this case as there was no prior demand for security and the motion was not made at the earliest opportunity, the application for further security should be dismissed.

Cases referred to:-

(1) *Abu bin Mohamed* v. *Voo Fui Tong & Anor.* [1938] M.L.J. 140; [1938] M.L.J. Rep. 135, 137.

(2) *Hood Barrs* v. *Heriot* [1896] 2 Q.B. 376.

FEDERAL COURT.

A. Wilson for the appellant.

Datuk H. L. Wrigglesworth for the respondent.

Raja Azlan Shah F.J.: On 26th August, 1973 the plaintiff obtained judgment against the defendant in the High Court at Kota Bharu for immediate vacant possession of premises No. 40, Jalan Market, Pasir Mas and costs. The defendant continued to be in possession and has sublet the ground floor as a restaurant. The plaintiff continued to pay the rent at the rate of $110 p.m. ever since the termination of the partnership on 31st May 1970 for fear that the tenancy would be terminated by the landlord for arrears of rent.

The defendant has appealed against the said judgment but has not yet paid the costs of the High Court action.

On 30th September 1973 the defendant applied for a stay of execution. The plaintiff did not object but asked for security for the unpaid costs below and costs of the appeal. The judge has jurisdiction to order a conditional stay e.g. the defendant to provide security for past costs, but he granted an unconditional stay. He has clearly no jurisdiction to order further security for costs of the appeal. That is the province of a Federal Court Judge (section 44 Courts of Judicature Act, 1964).

The plaintiff now comes before this court. His application which was filed on 10th October 1973 is in two limbs: (a) for security for the unpaid costs below, and (b) for further security for costs of the appeal. He says the defendant is an impecunious litigant and cannot afford to pay the past costs which is estimated at well over $5,000, the cost of the appeal which is estimated at more than $2,500 and the rent which is estimated at $5,000 by the time the appeal is determined by the Federal Court, should the defendant fail in the appeal.

The defendant says he has a good ground of appeal in law, *i.e.* he is a protected tenant under the provisions of the Control of Rent Act, 1966.

With regard to the application for unpaid costs below it is plain that the trial judge has granted an unconditional stay. That is eminently a matter of discretion for him and unless it can be shown that his exercise of discretion is plainly wrong, this court will not interfere. Nothing of sufficient gravity has been established to entitle this court to take a different view of the matter.

Rule 18(1) of the Federal Court (Civil Appeals) (Transitional) Rules, 1963 gives this court a discretion to order further security for costs of an appeal "at any time, in any case where it thinks fit". Thus this is a discretionary remedy to be exercised in accordance with well known principles. This court is not bound by any hard and fast rules, but has to look at all the circumstances of the case. (See *Abu bin Mohamed* v. *Voo Fui Tong & Anor.*[1]).

Poverty of the defendant is a ground to increase the security for costs but where it exists, the court must consider other circumstances, whether in a particular case it will order further security to be given. As was said by Lord Usher, M.R. in *Hood Barrs* v. *Heriot*[2] which was quoted by Horne J. in *Abu bin Mohamed's* case, *supra*:

"All that this court has ever held is that poverty or inability to pay is a special circumstances, and, where it exists the court must consider whether in the particular case it will order security to be given. The court is not bound in such a case to order security to be given. It has a discretion in the matter which it has exercised on many occasions".

The matter is therefore a question of discretion for the court.

It may well be that the defendant is in a state of doubtful solvency. But the matter must be resolved at the earliest opportunity, *i.e.* when the notice of appeal was given. Beyond saying in his affidavit that the defendant has appealed the respondent for some inexplicable reason has not disclosed the date the notice of appeal was given. A perusal of the Court Registry file reveals 4th September 1973 was the date, that is some 8 days after judgment was delivered.

In ordinary circumstances the respondent ought to confront the defendant by letter to give security. If there is no adequate response, then the respondent may apply to Court. In this case the matter was first raised at the time when an application for stay was made, that is 26 days after lodging the notice of appeal. The application for further security was made on 10th October 1973, that is 14 days after the matter was first raised in court, and 40 days after lodging of notice of appeal.

Having regard to all the circumstances of the case, I feel this is not a fit case to order further security for costs of the appeal. There was no prior demand for security and the motion was not made at the earliest opportunity.

The motion is dismissed with costs.

Azmi L.P. and **Ali F.J.** concurred.

Motion dismissed.

Solicitors: *Wilson & Co.; Wrigglesworth & Co.*

MAT v. INSPECTOR-GENERAL OF POLICE, MALAYSIA & ANOR.

[F.C. (Azmi L.P., Ali and Raja Azlan Shah F.JJ.) February 5, 1974]

[Penang — Federal Court Criminal Appeal No. 24 of 1973]

Administrative Law — Habeas Corpus — Detention — Restriction Order — Subsequent order cancelling the earlier restriction order — Service of order — Whether person should be released before new restriction order is served on him — Criminal Procedure Code (F.M.S. Cap. 6), s. 35 — Emergency (Public Order and Prevention of Crime) Ordinance, 1969.

In this case the appellant had originally be detained by the police under the Emergency (Public Order and Prevention of Crime) Ordinance, 1969. Subsequently a restriction order was made by the Minister for Home Affairs against the appellant. This order was dated the 6th August, 1973 but the Minister had in fact died on the 2nd August, 1973. On the 21st August, 1973, the Minister for Home Affairs made an order cancelling the earlier restriction order and he also made a new restriction order. The appellant applied for a writ of *habeas corpus* on the grounds that the original restriction order was illegal and that the illegality had not been cured by the subsequent restriction order. The High Court dismissed the application and the appellant appealed to the Federal Court. It was argued on the appeal (a) that the order cancelling the earlier restriction order had not been served on the appellant and (b) the appellant should have been released from custody on the service of the cancellation order before the new restriction order could be served on him.

Held: (1) on the facts the order cancelling the original restriction order had been properly served on the appellant;

(2) as the new restriction order was in substitution for the previous restriction order, it would be an empty formality to release the appellant on the service of the cancellation order in order to serve the new restriction order.

Cases referred to:-

(1) *Re Mohan Kumaramangalam* A.I.R. 1951 Mad. 583.

(2) *Godavari* v. *State of Maharashtra* A.I.R. 1964 S.C. 1128.

FEDERAL COURT.

Karpal Singh for the appellant.

Gunn Chit Tuan (Senior Federal Counsel) for the respondent.

Azmi L.P. (read by **Raja Azlan Shah F.J.**): This is an appeal against the judgment of the High Court dismissing appellant's motion for a writ of *habeas corpus*.

The following facts appear from the affidavits of the appellant and of A.S.P. Haji Junid bin Haji Abdul Aziz — The appellant was arrested on 8th June 1973 and ordered to be detained for 60 days by the police officer in exercise of powers conferred upon him by section 3 of the Emergency (Public Order and Prevention of Crime) Ordinance 1969. The period of 60 days is the maximum allowed for the detention of a person if the detention order is made by a police officer, and in this case the detention period expired on 6th August 1973. The Minister for Home Affairs may under section 3(3) extend the period of detention for 2 years. The Minister, however, in this case instead of extending the detention period made a restriction order on the appellant in exercise of powers given him by section 4A for a period of 2 years from the date of the order.

This restriction order was signed by Tun (Dr.) Ismail as the Minister for Home Affairs and bore the legend "bertarikh pada 6hb Ogos 1973" just above the Minister's signature. There was no suggestion made that the signature was not genuine, but since the Minister died on 2nd August 1973, he must have signed the restriction order on the 2nd August 1973 or before that date.

The Minister of Home Affairs, Tan Sri Mohamed Ghazali who succeeded Tun (Dr.) Ismail made two orders both bearing the date 21st August 1973: —

(1) an order cancelling the restriction order made by Tun (Dr.) Ismail, and

(2) a restriction order against the appellant for a period of two years with effect from the date of the order.

This restriction order hereinafter referred to as Tan Sri Ghazali's "restriction order" contained restrictions and conditions similar to those found in the previous restriction order made by Tun (Dr.) Ismail.

On 20th August 1973, the appellant moved the High Court for a writ of *habeas corpus* for his release on the following grounds: —